No. 85-224

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CITY OF RIVERSIDE, *et al.*,
Petitioners,

v.

SANTOS RIVERA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE WASHINGTON COUNCIL OF LAWYERS, THE CHICAGO COUNCIL OF LAWYERS, THE STATE BAR OF MICHIGAN, THE ANTITRUST, TRADE REGULATION AND CONSUMER AFFAIRS DIVISION OF THE DISTRICT OF COLUMBIA BAR, THE LOS ANGELES COUNTY BAR ASSOCIATION, THE MILWAUKEE BAR ASSOCIATION, THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BAR ASSOCIATION OF SAN FRANCISCO, AND THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENTS

PAUL M. SMITH *
JOSEPH N. ONEK
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amici

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Amici will address the following question:

Whether, in a damages case brought under the federal civil rights laws, a prevailing plaintiff's award of attorneys' fees under 42 U.S.C. § 1988 is limited to some fixed proportion of the damages received.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-224

CITY OF RIVERSIDE, *et al.*,
Petitioners,

v.

SANTOS RIVERA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE WASHINGTON COUNCIL OF LAWYERS, THE CHICAGO COUNCIL OF LAWYERS, THE STATE BAR OF MICHIGAN, THE ANTITRUST, TRADE REGULATION AND CONSUMER AFFAIRS DIVISION OF THE DISTRICT OF COLUMBIA BAR, THE LOS ANGELES COUNTY BAR ASSOCIATION, THE MILWAUKEE BAR ASSOCIATION, THE COMMITTEE ON LEGAL ASSISTANCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE BAR ASSOCIATION OF SAN FRANCISCO, AND THE PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICI

Amici are a collection of mandatory and voluntary bar associations—or sections or committees thereof—repre-

senting thousands of attorneys throughout the nation.[1] The membership of these groups is comprised of attorneys from every sector of the legal profession: solo practices, large and small law firms, local, state and federal governmental agencies, as well as civil rights and other public interest organizations. These members include many who have represented plaintiffs in cases brought under the civil rights laws and other fee-shifting statutes,[2] as well as many who have represented defendants, both private and governmental, in such cases.

In the view of *amici*, the key issue presented in this case is the one discussed by Justice Rehnquist in his opinion granting a stay of the decision below: whether, in civil rights cases, court-awarded attorneys' fees for prevailing plaintiffs must be limited so as to remain "proportional" to the damages won by these plaintiffs. 106 S.Ct. 5 (1985). *Amici* wish to bring to the Court's attention both the collective views of these bar groups on the meaning of fee-shifting statutes and the collective experience of attorneys litigating civil rights and other cases brought under such statutes.

Amici take the position that a rule of proportionality was never intended by Congress when it authorized fee-shifting. In addition, based on the practical realities of legal practice, we believe that such a rule would operate to discourage severely the litigation of meritorious civil rights claims. As it is, the litigation of civil rights claims is often an expensive and speculative means of producing income for plaintiffs' counsel. Too often, the difficulty of

---

[1] The views expressed herein represent only those of Division 2—Antitrust, Trade Regulation and Consumer Affairs—of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors.

[2] For example, the Plaintiff Employment Lawyers Association is composed primarily of solo practitioners and members of small firms who specialize in representing individual employees in employment-related cases.

securing an award of fees discourages members of the private bar from undertaking such cases. Limiting fee awards to an amount strictly proportional to the recovery will discourage the private bar even further from entering into this field of legal practice.[3]

STATEMENT

This case involves an award of attorneys' fees against the City of Riverside, California and five of its police officers, all of whom were held liable for violating the civil rights of the eight respondents. The underlying lawsuit was filed after the police officers violently disrupted a party in a private home, using tear gas and unnecessary physical force. J.A. 188. The officers engaged in this conduct despite the fact that they had no warrant, and the party was creating no disturbance. *Id.* They arrested many of those in attendance, including four of the respondents, but all criminal charges were ultimately dropped or dismissed. *Id.*

In 1980 a federal district court jury awarded respondents a total of $33,350 in damages on various claims,[4] with liability distributed among the six petitioners. After the verdict, respondents filed a motion for attorneys' fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988. In 1981, the district court awarded them $245,456.25 in fees and costs. J.A. 175. This fee award was affirmed by the United States Court of Appeals for the Ninth Circuit in 1982, J.A. 176, but in 1983 this Court granted a petition for a writ of certiorari, vacated

---

[3] The parties to this case have consented to the filing of this brief, and their letters of consent have been lodged with the Clerk.

[4] The original complaint alleged violations of the First, Fourth, and Fourteenth Amendments, as well as 42 U.S.C. §§ 1981, 1985(3), and 1986. It also made a variety of related state law claims, including false arrest and imprisonment, malicious prosecution and negligence. The jury ultimately found against petitioners only on the negligence, false arrest, false imprisonment, and constitutional claims.

the judgment below, and remanded the case for reconsideration in light of the decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), J.A. 184.

On remand, the district court reinstated the original fee award, seeing no basis for a reduction in (1) the fact that some other defendants were dismissed, (2) the fact that respondents did not prevail on every legal theory raised, or (3) the absolute amount of the damages. J.A. 187-92. On June 27, 1985, the Ninth Circuit again affirmed. J.A. 193. It agreed with the district court that respondents' claims all involved a common core of facts and related legal theories, so that, under *Hensley*, there was no basis for a fee reduction reflecting the fact that they won only on some of their claims. J.A. 195. It also specifically rejected the suggestion that a fee award of $245,456.25 was *per se* unreasonable because it greatly exceeded the damage award. J.A. 196.

On August 28, 1985, the decision below was stayed by Justice Rehnquist, who expressed the view that the case presented the important question whether civil rights fee awards must be "proportional" to damage awards. 106 S. Ct. 5 (1985). This Court granted certiorari in the case on October 21, 1985. *Amici* in this brief address only the proportionality issue identified by Justice Rehnquist.

SUMMARY OF ARGUMENT

Any rule that limits fee awards in civil rights cases to a "proportion" of the damages won would be inconsistent with the very reasons that led Congress to authorize fee-shifting in such cases. As the legislative history makes clear, the fundamental goal was to enable plaintiffs to enforce the civil rights laws even where the amount of monetary relief at stake would not otherwise make it feasible or desirable for them to do so. This goal requires fee-shifting even in damages cases because the amount of damages awarded to prevailing plaintiffs does not reflect the full societal benefits of civil rights enforce-

ment—benefits that exist independent of the extent of the concrete injury that a particular plaintiff may have suffered. *See Carey v. Piphus*, 435 U.S. 247 (1978).

A rule of proportionality would be inconsistent with the congressional goal, because it would once again rule out any civil rights case in which the particular damages at stake are outweighed by the costs of litigation. This basic principle has been recognized in numerous decisions approving fee awards that far exceed the nominal or relatively small damage awards won for plaintiffs. It is a principle that merely takes full account of the practical realities facing those who are engaged in the private practice of law. If lawyers are to view civil rights cases as comparable to other kinds of work they could perform, they must be assured compensation, when they win, for the full number of hours reasonably expended. In the absence of such assurance, whole categories of civil rights cases simply will not be brought.

To be sure, courts may properly consider the "results obtained" when they calculate civil rights fee awards. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). But this consideration must be done in relative, not absolute terms. The relevant question is whether the plaintiff's verdict represents a substantial, or only limited, victory with respect to the basic issues raised in the complaint. The court makes this assessment for the purpose of assuring that it is not awarding fees for time spent on a portion of the plaintiff's case that did not ultimately prove productive. There is no indication in *Hensley* or anywhere else that the factor of the "results obtained" should become an absolute ceiling on fees awarded to plaintiffs who have achieved everything that they set out to do.

Finally, in the absence of a proportionality rule, there is little danger that plaintiffs will be able to abuse the system and deliberately extract inflated fees in cases where their claim is strong but their injury is relatively

small. First, courts are charged with eliminating any compensation for lawyer time that is unnecessary or redundant. In addition, if plaintiffs prove unwilling to settle for the full relief they are reasonably entitled to, defendants themselves can cut off further fee liability by making an "offer of judgment" under Fed. R. Civ. P. 68. *See Marek v. Chesny*, 105 S. Ct. 3012 (1985). At the same time, where the merits of a case are questionable, plaintiffs themselves will have ample incentive to settle, rather than risk losing everything at a trial. And if they persist in pursuing frivolous claims, they may be ordered to pay the defendant's fees. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

ARGUMENT

I. A Rule of "Proportionality" Between Damages and Fees Would Conflict with the Fundamental Purpose for which Congress Authorized Fee Awards under the Civil Rights Laws.

In deciding whether civil rights fee awards should be limited to a proportion of damage recoveries, this Court is not required to weigh competing values. It need not, for example, decide whether the importance of civil rights enforcement outweighs the goals of lessening the caseload of the federal courts or easing the litigation burdens of public defendants. In this case, the balancing of competing considerations has already been done, by Congress. The determinations made by Congress when it enacted section 1988 and other fee-shifting provisions in the civil rights field are flatly inconsistent with any rule that would limit fee awards to some "proportion" of the damages won by civil rights plaintiffs.

A rule of proportionality, as we understand it, would put an absolute ceiling on fee awards for prevailing plaintiffs in damages cases under the civil rights laws, limiting such fees to a percentage of the damages awarded. Such a rule would presumably be based on the premise

that, in the absence of a fee-shifting provision, plaintiffs' attorneys would not bill their own clients an amount in excess of the relief obtained. *See* 106 S. Ct. at 8 (Rehnquist, J., in Chambers, staying the judgment in this case). This premise, however, is itself factually incorrect. Since it is usually difficult, at the outset of litigation, to predict the ultimate recovery, it is not at all unusual for lawyers who bill by the hour to charge an amount that far exceeds any relief won for the client.

In any event, such an analogy to the practices of lawyers in the absence of fee-shifting is meaningful only to the extent that it was contemplated by Congress when it passed section 1988. The proportionality rule proposed here has been rejected repeatedly, not only by this Court but by virtually every court that has ever examined the question,[5] for one very simple reason: it is flatly inconsistent with the intent of Congress. When Congress decided to authorize fee-shifting in the civil rights context, its central concern was the fact that, in many civil rights cases, there is a divergence between (1) the amount of fees that a plaintiff can and will pay, and (2) the amount that a lawyer would demand in payment before agreeing to undertake the work involved. Its response was to impose the burden of attorneys' fees on a third party—the losing defendant—and to tie the *amount* of fee awards to the only factor that will make litigation a practical possibility in every meritorious case—*i.e.*, the hours of work required to win the case, regardless of the amount of concrete relief at stake. This congressional decision cannot be squared with any rule of proportionality that would, by linking fees with damages, make it once again infeasible for persons with valid civil rights claims but relatively small potential damages to turn to the courts for redress.

---

[5] *See* pp. 14-17 *infra*.

A. The Intent of Congress

When Congress enacted section 1988, it authorized prevailing plaintiffs to seek a fee award in a broad range of cases brought to vindicate constitutional and civil rights.[6] In so doing, its main concern was to assure the financial feasibility of private civil rights enforcement. As the Senate Report on the bill put it, if "private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976) [hereinafter cited as "Senate Report"].[7]

---

[6] Prior to 1976, fee-shifting was statutorily authorized under certain provisions of the 1964 Civil Rights Act, including Title VII. In section 1988, Congress remedied the "anomalous gaps in our civil rights laws," S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976), that were highlighted after this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which barred the imposition of fee-shifting in the absence of statutory authorization. It did so by authorizing fee awards in cases brought under 42 U.S.C. § 1983 and several other key civil rights statutes.

[7] *See also Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances."); *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982) ("The function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.")

It has been suggested that Congress had two other objectives as well: "penalizing obstructive litigation by civil rights defendants, and generally deterring civil rights violations." *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982). Clearly, to the extent that these additional legislative purposes should be weighed in the balance, they only strengthen the argument against an arbitrary limitation on fee awards unrelated to the amount of work reasonably required to win a case. Such a limitation would *encourage* obstructive litigation by defendants whenever they know that a plaintiff's attorney has already worked more hours than he is likely to be paid for. *See* p. 25 *infra*. And it would certainly lessen the general deterrence of civil rights violations.

The need for some mechanism to help finance civil rights litigation stemmed from two inescapable realities. First, the "vast majority of the victims of civil rights violations" are not sufficiently wealthy to pay their own legal counsel. H. Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976) [hereinafter cited as "House Report"]. Second, in many cases, the relief at issue is worth less than the cost of litigating the claim. *Id.* at 9.[8] As a result, in such cases, few plaintiffs would be willing to finance the case out of their own pockets. Moreover, it would not be feasible for them to rely on the traditional financing mechanism for most kinds of tort cases—the contingent fee.

To be sure, Congress had at least two other choices. First, of course, it could have funded a new cadre of governmental enforcement personnel to bring enforcement actions in those cases where private plaintiffs would not do so. But it made a conscious decision not to impose the costs of enforcement on the taxpayers. *See* Senate Report at 4 ("These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.") It sought instead to rely on the victims of constitutional and civil rights violations to act as "private attorneys general," *id.* at 3, performing the public function of civil rights enforcement at no cost to the government.

Having opted for primary reliance on private enforcement, Congress still had a second alternative to fee-shifting: it could simply have left the costs of this enforcement on the shoulders of potential plaintiffs, and accepted the level of enforcement activity that would have re-

---

[8] *See also* 122 Cong. Rec. 31832 (1976) (remarks of Sen. Hathaway) ("In the typical case arising under these civil rights laws, the citizen who must enforce the provisions through the courts has little or no money with which to hire a lawyer, and there is often no damage claim from which an attorney could draw his fee.")

sulted from that decision. But as we have suggested, without some form of subsidy to prevailing plaintiffs, few cases would be brought in circumstances where the likely *monetary* return is low. The private bar simply could not be relied upon to file a sufficient number of such cases on a *pro bono* basis. Congress therefore went out of its way to emphasize the appropriateness of fee awards to prevailing plaintiffs where the rights at stake are "non-pecuniary in nature." Senate Report at 6.

One important category of cases where there is no substantial monetary recovery is, of course, those where the relief sought is purely injunctive. *See* House Report at 9. But Congress also made it clear that fee-shifting should be available in damages cases as well. The House Report on section 1988 expressly provided that "the mere recovery of damages should not preclude the awarding of counsel fees." *Id.* at 8. Congress made this choice, despite the fact that damages alone would finance some civil rights enforcement, because it concluded that it would be inappropriate to limit such enforcement to cases where the damages are substantial enough to outweigh litigation costs. In so doing, it recognized two key facts: (1) that damages cases can play a significant role in the deterrence of civil rights violations, and (2) that the socially desirable level of deterrence is not provided if damages alone are the sole means of financing the litigation.

The utility of damages cases as a means to deter illegality is fairly clear.[9] But the insufficiency of damages

---

[9] *See, e.g., McCann v. Coughlin*, 698 F.2d 112, 129 (2d Cir. 1983) ("The deterrent effect of successful § 1983 actions is wholly independent of the relief which the plaintiff seeks or is ultimately awarded . . . ."); Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447, 451 (1978) (in the "battle to restrain official misconduct," the "private suit for civil damages" is "our most promising weapon").

To be sure, the Solicitor General does appear to suggest that damages cases produce only private, rather than public benefits.

as a means to finance civil rights litigation is a somewhat more complex matter. The basic problem with reliance on damages alone to encourage the actions of "private attorneys general" is that the amounts awarded to plaintiffs in civil rights cases do not reflect the societal importance of the rights at issue. They are calculated solely on the basis of the concrete injuries suffered by the individual plaintiff as a result of the deprivation of statutory or constitutional rights. For example, in *Carey v. Piphus*, 435 U.S. 247 (1978), this Court held that a person denied procedural due process may win damages under 42 U.S.C. § 1983 only to the extent that he can show an actual "injury" to his person or property requiring compensation.[10] It rejected the notion that damages may reflect the "intrinsic" value of this constitutional right. *Id.* at 254-57.[11] Put differently, when a plaintiff sues to redress a denial of his civil rights, his damages are calculated no differently than they would be in a case of injury caused by simple negligence.

Brief for *Amicus* the United States at 11-12. This suggestion ignores the deterrent value of damages cases. In the area of individual police misconduct, of course, damages are the key deterrent, since injunctive relief generally is not available. *See Rizzo v. Goode*, 423 U.S. 362 (1976).

[10] The Court went on to note that, in certain circumstances, it may be appropriate to "presume" actual injury, at least where that is the rule in analogous common-law tort cases. *Id.* at 257-64. Such a presumption, where appropriate, of course does not alter the basic principle that damages merely compensate the plaintiff for *his* concrete injuries.

[11] *See also Doe v. District of Columbia*, 697 F.2d 1115, 1122-25 (D.C. Cir. 1983) (following *Carey v. Piphus* in an Eighth Amendment case); *Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980) (following *Carey v. Piphus* in a case involving First Amendment associational rights).

We note that a case presently on review in this Court raises issues concerning the applicability of *Carey* to certain substantive constitutional rights. *Memphis Community Schools v. Stachura*, No. 85-410 (cert. granted October 21, 1985).

In the normal tort context, such an emphasis on the actual extent of injuries incurred is considered a desirable mechanism for producing the appropriate level of private "enforcement": injurious conduct is deterred only where, and to the extent that, it causes actual harm to some other person. In the civil rights context, however, Congress plainly concluded that this level of private enforcement is not enough. It did so both because it viewed any violation of the Constitution or civil rights laws as a "wrong" in itself,[12] and because it saw that providing judicial redress in any such case produces benefits to society that are not reflected in damage awards. When schools, workplaces and housing are desegregated, people are given the opportunity to learn, work and live in more diverse and open environments. When people are able to speak more freely, the will of the people is more effectively represented. And when police are deterred from racially motivated harassment of citizens, the immediate physical injuries prevented may be small, but in the long run the result may be fewer urban riots and greater citizen cooperation in law enforcement. These kinds of social benefits are produced whenever civil rights are enforced, regardless of the essentially fortuitous factor of the amount of concrete injury that a given plaintiff can prove.

In sum, the central purpose of Congress's decision to authorize fee awards in damages cases was to provide sufficient compensation to allow litigation of meritorious claims even where the amount of damages to be won might not otherwise be sufficient to justify a lawsuit. In so doing, it is hardly likely that Congress simultaneously foresaw a rule for calculation of fees—proportionality—that would merely replicate the problem. After all, under the proportionality rule, it still would be financially undesirable and infeasible for plaintiffs and their lawyers

---

[12] Congress emphasized that the acts at issue here, unlike a garden-variety instance of negligence, involved violations of the "Nation's fundamental laws." Senate Report at 2.

to bring suits in those cases where damages are outweighed by litigation costs.[13] Such plaintiffs and lawyers would know, in advance, that their prospective fee award simply could not cover the costs involved, and would therefore opt to do nothing.

Certainly there is no indication in the legislative history that Congress anticipated a rule under which fees would be reduced proportionally to reflect the amount of damages awarded. On the contrary, the only comment in the House and Senate reports that discusses the relation between fees and damages suggests, and then apparently rejects, the converse rule—*i.e.*, that fees should be withheld when damages get too *high*, because the need for an incentive no longer exists. House Report at 8-9.[14]

More fundamentally, when Congress set about describing the standards that would apply to fee awards, it re-

---

[13] It is thus baffling that the Solicitor General would suggest that fee awards in damages cases should be limited to the amount that an attorney would receive under a traditional contingent-fee arrangement. Brief for *Amicus* the United States at 21. Such a rule would render fee-shifting statutes nugatory in damages cases, because it would only allow the prosecution of the very same cases that would be brought absent any special rule. Certainly it is untenable to suggest, as does the Solicitor General, *id.* at 22-23, that a contingent fee of $11,000 in this case, which involved several years of discovery and nine days of trial, would have represented a fair fee, sufficient to attract competent counsel.

[14] The report suggests that civil rights plaintiffs who recover substantial damages should not be treated less favorably than antitrust plaintiffs who may recover attorneys fees even after receiving *treble* damages. Nevertheless, some courts still seem to be applying a rule that is the inverse of the proportionality rule—the "bright prospects" rule under which fees may be denied "where the merits of a claim are obviously strong and would be so recognized by local counsel and where the probable damage award is high and would be so recognized by counsel." *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir. 1982). *See also Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979). *But see Cooper v. Singer*, 719 F.2d 1496, 1501-02 (10th Cir. 1983); *Sanchez v. Schwartz*, 688 F.2d 503, 505 (7th Cir. 1982); *Sargeant v. Sharp*, 579 F.2d 645 (1st Cir. 1978).

jected any analogy to the amount that a plaintiff would willingly pay, and drew a quite different comparison. It authorized fee awards comparable to what an *attorney* would generally demand in payment before undertaking a given amount of work. As the Senate Report accompanying section 1988 put it, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" Senate Report at 6 (quoting *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974)). *See also Hensley v. Eckerhart*, 461 U.S. at 433. Put differently, Congress's "basic goal" was that "attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in such cases (and hence the funds out of which their clients would pay legal fees) would seldom be equivalent to recoveries in most private-law litigation." *Id.* at 1946 (Brennan, J., concurring in part and dissenting in part). And it pursued this goal by authorizing prevailing plaintiffs' counsel to be paid for all hours of work that are reasonably required to prevail in a particular case.[15]

B. The Relevant Case Law

In view of the clarity of this legislative record, it is not surprising that the relevant judicial precedents are equally one-sided. This Court, and virtually all of the courts of appeals, have rejected the notion that the amount of damages won by a civil rights plaintiff should impose some kind of proportional ceiling on fee awards, independent of the amount of work reasonably required to win the case.

---

[15] This standard does not, as suggested by the Solicitor General, create "windfalls" for attorneys. Brief for *Amicus* the United States at 16, 26. While fee awards sometimes exceed corresponding damage awards, they always reflect hours of actual work by attorneys. It is only the traditional contingent fee arrangement that ever produces a real "windfall." *See* note 19 *infra*.

First, there is a long series of cases involving the availability of fees in cases where the damages awarded are purely nominal. For example, as we have noted, in *Carey v. Piphus*, *supra*, this Court held that there may not be actual damages awarded for the "intrinsic" value of procedural due process rights, but it nevertheless held that persons denied due process may bring suit, regardless of any concrete injuries, and receive nominal damages. It based this ruling on the "importance to organized society that those rights be scrupulously observed." 435 U.S. at 266-67. In the course of this decision, the Court went out of its way to point out the critical role that section 1988 would play in allowing such a lawsuit to proceed despite the absence of substantial concrete injuries to the plaintiff. The Court stated: "We also note that the potential liability of § 1983 defendants for attorney's fees, see [§ 1988], provides additional—and by no means inconsequential—assurance that agents of the State will not deliberately ignore due process rights." *Id.* at 257 n.11. In sum, the Court rejected, at least implicitly, any principle of proportionality by indicating that there could be a substantial fee award—sufficient to make litigation a practical possibility—even where the damages awarded amount to one dollar. This decision has been followed by a great many courts of appeals. *See Nephew v. City of Aurora*, 766 F.2d 1464, 1466-67 (10th Cir. 1985); *McCann v. Coughlin*, 698 F.2d 112, 128-29 (2d Cir. 1983); *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1220 (5th Cir. 1982); *Bonner v. Coughlin*, 657 F.2d 931, 934 (7th Cir. 1981) (*per curiam*); *Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979); *Burt v. Abel*, 585 F.2d 613, 617-18 (4th Cir. 1978).[16]

---

[16] Some of these decisions do recognize that the nominal nature of the damage award is a factor to be considered in determining the size of the fee award. *See Bonner v. Coughlin*, 657 F.2d at 934; *Perez v. University of Puerto Rico*, 600 F.2d at 2. But as we discuss *infra*, giving due consideration to the amount of damages won is quite appropriate, and does not amount to the same thing as enact-

In addition, many courts have recognized the obvious corollary of the principle that nominal damages can justify substantial fees. They have held that a *small* award of actual damages does not impose an absolute limit on the fees available to the prevailing plaintiff. *See DeFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985); *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983); *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 238-39 (8th Cir. 1982); *Furtado v. Bishop*, 635 F.2d 915 (1st Cir. 1980); *Coop v. City of South Bend*, 635 F.2d 652 (7th Cir. 1980); *Walston v. School Board*, 566 F.2d 1201, 1204-05 (4th Cir. 1977).[17] Certainly, it would be anomalous to allow a plaintiff who wins nominal relief to receive a fully compensatory fee, while penalizing another plaintiff merely because, in his case, the constitutional violation caused some actual harm and he was therefore able to win some—albeit not a great deal—of actual damages. In each case, the problem is the same: the damages awarded do not take into account the societal importance of civil rights enforcement, and thus cannot serve as any absolute guidepost for the fee to be awarded to the plaintiff's counsel.

Finally, we note that in *Blum v. Stenson*, 104 S. Ct. 1541 (1984), this Court expressly rejected the argument that fee awards should vary depending on the *number* of

---

ing a rule of proportionality. All of the cited decisions authorized *substantial* attorneys' fees in cases involving totally insubstantial damage awards.

[17] Indeed, the only decision we have located that endorsed a flat rule of proportionality is the decision in *Scott v. Bradley*, 455 F. Supp. 672 (E.D. Va. 1978), cited in Justice Rehnquist's stay opinion, 106 S. Ct. at 8. This decision, however, appears to be inconsistent with the governing rule in the Fourth Circuit. *See Walston, supra*; *Burt, supra*.

Petitioners rely on *Jaquette v. Black Hawk County*, 710 F.2d 455 (8th Cir. 1983), Br. at 16, but this decision plainly provides that a "modest damage award" should not "dictate the size of the attorney fee." 710 F.2d at 461.

clients who receive the benefits of a given lawsuit. *Id.* at 1549 n.16. Clearly, where the lawyer represents a large class, this fact will affect the overall amount of any monetary benefit won, but it need not affect the amount of work involved. "Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual." *Id.* And, since fee awards under section 1988 should depend upon the "amount of attorney time reasonably expended on the litigation," *id.*, the amount of the fee award should be unaffected. In sum, here again, the Court clearly assumed that the relevant factor is not the absolute amount of relief won, but the amount of work reasonably required to win the case for the prevailing plaintiff.

C. Practical Considerations

As we have suggested, in authorizing fee awards to prevailing plaintiffs, Congress anticipated awards based not on what a plaintiff would willingly pay for the damages won, but on the amount that a lawyer would ask to undertake the work involved. Put differently, the key factor in setting the fee award must be the number of hours worked, not the relief produced. In making this choice, Congress was simply taking into account the practical realities that face those lawyers engaged in the private practice of law. In 1976, when section 1988 was adopted, as today, the key factor in setting the fee of lawyers in private practice was and is the number of hours worked. A 1968 study based upon a questionnaire submitted to lawyers in all 50 states by the American Bar Association concluded, "Overwhelmingly, the factor considered the most is the time spent." Roehl, "Modern Billing Techniques—1968 Survey," *Proceedings of the Third National Conference on Law Office Economics and Management* 171, 178 (ABA 1969).[18]

---

[18] According to the study, *100%* of the reporting firms considered time in their billing, and an average factor of 58% of the fee was

In light of this reality, it was essential for Congress, in its effort to attract lawyers to civil rights litigation, to provide for compensation on a comparable basis. While many members of the private bar do recognize an obligation to do some *pro bono* "public interest" litigation, reliance on altruism or a sense of professional obligation is not enough. If private law firms are to be attracted to civil rights litigation in a substantial way, they must at least be promised compensation for all of the hours of work that they reasonably undertake, in the event that they prevail.

We recognize, of course, that all lawyers, including those paid by the hour, do make adjustments in their bills in certain cases. And, as we discuss in the next section, there is room for some parallel "billing judgment" in civil rights cases by plaintiffs' attorneys and ultimately by courts. But it would be quite another thing to impose a draconian ceiling that is totally unrelated to the work performed by those attorneys. After all, there are already a number of other significant disincentives to entry into this field of legal practice. In civil rights cases, unlike most other types of cases, the lawyer faces the risk that he will lose his fee altogether if he loses.[19] More-

---

determined solely on the basis of the time devoted to the resolution of the matter. By contrast, the same study reported that less than 41% of reporting firms relied upon the benefits obtained for the client in setting the fee, and then to the extent of only 18% of the fee factor. *Id.* at 177.

[19] To be sure, in tort litigation, a contingent fee arrangement is common. But there, the lawyer's risk of losing his fee is counterbalanced by the possibility that he may be significantly over-compensated, if a case settles early for a substantial damage award. Under a fee-shifting statute, since fees are always calculated based on the number of hours worked by the attorney, the risk of losing the fee is not counterbalanced by a chance of over-compensation. It is also worth noting that "[p]laintiffs in police misconduct suits seem *less* likely than plaintiffs in general to succeed in recovering damages." Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789 n.37 (1979) (citing statistics).

over, he generally knows that he will receive no fee whatever until after a case is over, and even then may face years of litigation over the fee issue alone.[20] And he often knows that his opponent will be represented by counsel employed by a governmental entity, and thus will not face the usual financial pressures to resolve a case quickly. If these disincentives are augmented by a rule that limits fee recoveries to some percentage of damages recovered, the obvious result will be refusal by most lawyers to handle any civil rights case, except those where there is a likelihood of substantial damages—*i.e.*, the same cases that would be brought even in the absence of any form of fee-shifting.

In practice, this would mean the nearly total exclusion of civil rights enforcement in categories of cases where damages are seldom large. One such area, for example, is housing discrimination, where damage awards in cases involving individual acts of discrimination range from a few hundred to a few thousand dollars. *See* Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv. C.R.-C.L. L. Rev. 83, 105-20 (1981). *See also DiFilippo v. Morizio*, 759 F.2d at 235 (award of $2250 is consistent with "fair housing damage awards generally"). Another, as *Carey v. Piphus* suggests, is the area of procedural due process, where most often the damages will either be nominal or be limited to the injury caused by a temporary and erroneous denial of a governmental benefit. Even in the area involved in this case—police misconduct—there are many cases where the actual injury inflicted is not large. *See Kerr v. Quinn*, 692 F.2d 875, 878 (2d Cir. 1982); Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 789 nn.36 & 37 (1979) (citing low average damage awards); Newman, *Suing the Lawbreakers: Proposals to Strengthen the § 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 Yale L.J. 447,

---

[20] *See, e.g., Laffey v. Northwest Airlines*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 3488 (1985); *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982).

465 (1978) ("[E]xcept in the rare case in which a successful plaintiff recovers a substantial award for serious injuries inflicted by excessive force, cases of illegal arrests and searches, even when successful, generally result in very modest awards.")[21] In sum, if the civil rights fee-shifting provisions are to operate in a way consonant with the congressional goal of maximizing the enforcement of meritorious claims, they must be understood to allow fee awards that are not restricted by any arbitrary formula based upon the total amount of damages won.[22]

II. The "Results Obtained" in a Lawsuit are Relevant to the Amount of Fees Awarded, but They Must Be Assessed in Relative, Not Absolute Terms.

In arguing against any proportional limitation on fee awards, we do not mean to suggest that the amount of damages won in a civil rights case never plays a role in the determination of the amount of fees to be assessed.

---

[21] Judge Newman goes on to note that the injury caused by several days of erroneous custody in jail has sometimes been valued as low as $500, while a few hours in jail has been valued as low as $100. *Id.* (citing cases). *See also Dellums v. Powell*, 566 F.2d 167, 194-96 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) ($7500 in damages is "totally out of proportion" to the actual harm suffered when demonstrators were wrongfully arrested and detained).

[22] Similar problems would arise if the proportionality rule were extended beyond the civil rights context to other areas. One example would be litigation under the Truth in Lending Act. That Act generally is limited to setting out various disclosure requirements for lenders, and applies only to relatively small consumer credit transactions. 15 U.S.C. § 1603. As a result, in any civil suit to enforce it, the amount of actual damages tends to be low. The act also provides for a statutory penalty, but it is capped at $1,000. *Id.* § 1640(a)(2)(a)(i). It follows that fee awards under the statute, *see id.* § 1640(a)(3), can and should frequently exceed any other monetary recovery. *See, e.g., Price v. Franklin Investment Co.*, 574 F.2d 594, 598 n.5 (D.C. Cir. 1978) (citing cases). *See also West v. Capitol Federal Savings & Loan Ass'n*, 558 F.2d 977, 981 (10th Cir. 1977) (class action under the antitrust laws) ("Although the individual amounts here involved are small, . . . the attorneys are entitled to a fee award based on the legal work, not the amount of recovery.")

On the contrary, this Court made clear in *Hensley v. Eckerhart* that the court should consider, among other factors, the "results obtained" by counsel for their clients. 461 U.S. at 430, 434.[23] The key, however, is to recognize precisely *how* this factor properly affects the amount of the fee award.

Nothing in *Hensley* suggests that the "results obtained" by the plaintiff should be weighed in absolute terms—*i.e.*, as a fixed limitation on the amount of fees that can be awarded. Instead, the level of success must be assessed *relative* to what the plaintiff sought in his complaint. In this sense, the factor of the "results obtained" is simply a restatement of the basic principle that fee awards are contingent on success on the merits. What the Court made clear in *Hensley* is that success on the merits is not a "yes or no" matter. Instead, a plaintiff may "prevail" only in part. If he does so, he should recover only a partial award of fees, reflective of the amount of time he spent on matters that later proved to be productive.

As the *Hensley* Court pointed out, there are two ways in which a plaintiff can achieve only partial success on the merits. First, of course, where a plaintiff has pleaded several unrelated claims and prevailed on only some of them, the court should properly exclude the hours expended working on the unsuccessful claims. 461 U.S. at 434-35.[24] Second, even if the complaint pleads only one

---

[23] This holding was based on the House and Senate Reports accompanying section 1988, which expressly endorsed the analysis set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See* Senate Report at 6; House Report at 8. The Fifth Circuit's test for fee awards in *Johnson* was made up of twelve factors, including the factor of the "amount involved and results obtained." *Id.* at 718. Thus, this citation clearly "indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded." *Hensley*, 461 U.S. at 430.

[24] On the other hand, if a plaintiff pleads several different claims for relief, all of which involve the same basic facts and similar

claim or an interrelated set of claims, it is still possible for a plaintiff to "prevail" only partially. In essence, the court is charged with determining whether the plaintiff achieved "substantial relief" rather than "limited success" on his central claim. *Id.* at 440. In so doing, the court must examine the legal theories pleaded and the relief sought, and decide whether the plaintiff achieved "excellent results." *Id.* at 435. If so, he should not have his fee award reduced merely because he failed to prevail on every single legal contention raised, *id.*, or merely because he failed to win every single type of relief sought, *id.* at 435 n.11.[25] Where, on the other hand, the court is convinced that the plaintiff did not accomplish much of what he set out to achieve, a partial reduction in fees is required. *See id.* at 438 n.14 (a "limited fee award" is appropriate where " 'minor' relief obtained").

The main point, for present purposes, is that all of these assessments involve comparisons between (1) the original theories and goals set out by the plaintiff and (2) the outcome of the case. There is no suggestion in *Hensley* that the "results obtained" is a factor that imposes an absolute limit on fees, unrelated to the degree of

---

types of legal theories, he should not be penalized when he prevails on only one such claim. *Id.* at 435 ("Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.")

[25] It is not altogether clear, after *Hensley*, how a court should handle a situation in which a plaintiff has asked for one sum of money as damages, and only received a lesser, albeit still substantial, sum. In our view, this difference alone should not be a justification for limiting fees, except in two instances: (1) where the lower damage recovery reflects the plaintiff's failure to convince the court about a discrete *type* of injury, which required separate legal preparation, or (2) where it reflects less-than-adequate presentation of the case, *see DeFilippo v. Morizio*, 759 F.2d 231, 235 (2d Cir. 1985). In other cases, it seems both unfair and counterproductive to penalize plaintiffs and their counsel, when they have won substantial victories, merely because they failed to guess accurately the precise amount of damages they could win from a court.

the plaintiffs' success on the goals he set for himself. On the contrary, the Court went out of its way to reiterate that when plaintiffs win the results they are seeking, they should "recover a fully compensatory fee," defined in terms of the "hours reasonably expended on the litigation." *Id.* at 435. In sum, nothing in *Hensley* or any other controlling decision undermines the fundamental fact that a proportionality rule would be inconsistent with the goals Congress sought to pursue in authorizing fee awards in civil rights cases.

III. A Rule of Proportionality is Not Needed to Prevent Abuse.

It is also worth noting that the present fee-shifting system does not create any serious potential for abuse by plaintiffs or their counsel. There would be real reason for concern if a fee-shifting rule gave plaintiffs *carte blanche* to incur unlimited fees whenever they have a strong case on the merits and thus are very likely to prevail. In such circumstances, plaintiffs could vastly augment the financial exposure of defendants who, by hypothesis, did deprive them of legal rights but may have caused very little real injury. In fact, however, there is very little danger that such abuses will occur, in light of two existing checks in the system: (1) the power of the court to exclude excessive hours, and (2) the power of the defendants to cut off further liability for fees and costs by offering to pay the full value of the injury under Fed. R. Civ. P. 68.

In arguing that the hours worked by plaintiffs' counsel should be the primary basis for a fee award, we do not mean to suggest that the hourly totals submitted provide the complete answer in every case. As Justice Rehnquist pointed out in his stay opinion in this case, the Court has recognized the possibility of downward, and upward, adjustments in the "lodestar" hourly figure. 106 S. Ct. at 8 (citing *Hensley* and *Blum v. Stenson*, 104 S. Ct. 1541

(1984)). One example of an appropriate judicial adjustment is the situation just discussed—where the court is convinced that the plaintiff only partially prevailed. But even where the victory is complete, the court may still conclude that counsel are seeking compensation for hours of work that were "excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. In such a situation, this Court has already made clear that courts should exercise their own "billing judgment" and reduce the fee to an amount that reflects the hours *reasonably* expended in the case. This power to adjust the fee award represents a useful potential check on any attempt by a plaintiff's lawyer with a small but strong civil rights case to "pad the bill."

A related problem would arise if a plaintiff's lawyer were to insist upon *proving* his case—in order to maximize the fee recovery—despite the defendant's willingness to settle for a reasonable damage payment early on in the process. This is a problem that defendants can deal with themselves. As this Court made clear last Term in *Marek v. Chesny*, 105 S. Ct. 3012 (1985), Rule 68 of the Federal Rules of Civil Procedure provides a potent means of defusing any distortion in the settlement process that may result from the desire of a plaintiff's lawyer to litigate fully a small but meritorious case. If (1) the defendant makes a valid "offer of judgment" under this rule, (2) it is declined by the plaintiff, and (3) the plaintiff ultimately recovers less than the offer, then the plaintiff cannot recover any fees or costs incurred after the date of the offer. In sum, by incorporating a settlement offer in a Rule 68 offer of judgment, defendants can effectively forestall further fee liability.[26]

---

[26] To be sure, some defendants may refuse to make such an offer, even where their ultimate liability is fairly clear, because they are unwilling to admit voluntarily to a violation of the Constitution or the civil rights laws. But this potential psychological factor—the unwillingness of defendants to settle where financial considerations

Such settlement offers will not always occur, of course, where the ultimate liability of the defendants is less clear. But in such a case, it is the self-interest of the plaintiff and his attorney that comes to the fore and helps to promote settlement. A plaintiff with a questionable case has every reason to seek a reasonable settlement rather than risk winning nothing at trial. And his attorney has the same basic set of incentives. Because he wins no fees if he fails to prevail on the merits, he too is far less likely in a questionable case to prefer drawn-out litigation to a reasonable settlement. Finally, if a plaintiff persists in pursuing a frivolous case, he himself may be liable for the attorneys' fees of the defendant. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

In contrast to these various safeguards in the present system, under a proportionality rule a plaintiff would have no way to prevent a defendant from extracting an unfair advantage by refusing to settle a clearly losing case. As suggested above, defendants' counsel are very often paid by public funds and thus could easily drag matters out in such a case until they knew that the hours worked by the plaintiff's attorney had gone well beyond any likely fee recovery under the proportionality rule. In so doing, defendants could use the rule as an effective means of punishing, and deterring, those lawyers in the community who have exhibited a willingness to take on meritorious civil rights cases in reliance on the fee-shifting authorized in section 1988.

For all of these reasons, we submit that the practical effect of the present system is not to open the door to significant abuses, but to prevent abuses. With a fee-shifting rule that does not limit fees to a proportion of

---

so dictate—does not argue for some arbitrary proportional limitation on plaintiffs' fee awards. To the contrary, this unwillingness is one of the potential barriers faced by plaintiffs in civil rights cases which requires and justifies full fee awards.

damages, many more civil rights cases are brought. But that is exactly what Congress intended. When these cases are brought, the court and the defendants have ample means to combat the risk of "overly zealous" litigation by plaintiffs. And plaintiffs themselves, in most cases, have adequate incentive to resolve cases rather than continuing with unnecessary court battles.

CONCLUSION

For these reasons, the decision below should not be reversed on the basis of any perceived disproportionality between the damages won and the fees awarded.

PAUL M. SMITH *
JOSEPH N. ONEK
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
Counsel for Amici

* Counsel of Record